STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP381-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORRY L. ARDELL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Statutes

Other Authorities

ISSUES PRESENTED

Ardell stands convicted of stalking under Wis. Stat. § 940.32(2). The first element of the offense required the State to prove he intentionally engaged in a course of conduct *directed at* his victim, NT. The statute does not define the phrase *directed at,* and Ardell did not advocate for a specific definition or interpretation before or during trial.

As respondent in a criminal appeal, the State routinely uses the defendant-appellant's statement of issues to organize its response. That is difficult to do in this case. Counting subheadings as separate issues, Ardell presents ten issues for appellate review. (Ardell's Br. *ix–xi*.) His first, second, third, and fourth issues stem from an interpretation of Wis. Stat. § 940.32(2)(a) Ardell raised for the first time in his motion for postconviction relief. He asserted that the phrase *directed at* excluded acts or communications regarding the victim but directed at third parties, absent a jury finding beyond a reasonable doubt that the defendant either intended the information to be passed on to the victim, or intended the third parties to harass the victim based on the information.

Ardell's fifth and sixth issues stem from the jury instruction used to describe the mental state required of Ardell for conviction under Wis. Stat. § 940.32(2)(a). These issues were also raised for the first time in Ardell's motion for postconviction relief.

By failing to make proper, timely objections in the circuit court before or during trial, Ardell has forfeited his right to direct appellate review of his first six issues.

Ardell's seventh, eighth, ninth, and tenth issues are properly preserved for direct appellate review.[1]

Given this procedural posture, the State offers a rephrased set of issues, and will organize its brief accordingly:

1. As to the six issues presented for the first time in postconviction proceedings, is Ardell only entitled to appellate review of the underlying claims within the context of ineffective assistance of counsel?

2. Did trial counsel perform ineffectively by failing to raise those six issues before or during trial?

3. Has Ardell properly interpreted Wis. Stat. § 940.32(2)(a)?

4. Did the circuit court err in denying Ardell's postconviction motion without a hearing?

5. Should this Court reverse Ardell's conviction in the interest of justice under Wis. Stat. § 752.35?

6. Should this Court order the circuit court, upon remittitur, to direct the clerk of court to enter a judgment of

---

[1] While not presented as a separate issue on appeal, Ardell's brief also contains a separate section headed: "The identified errors prejudiced Ardell's defense and were not harmless." (Ardell's Br. 29.) In it, Ardell presents various facts of record in the light most favorable to him, and in the light of his newly-devised interpretation of the phrase *directed at* in Wis. Stat. § 940.32(2)(a). (Ardell's Br. 29–32.) The section contributes little to resolution of this appeal. This Court must construe the evidence in the light most favorable to the conviction. (State's Br. 5.) This Court should not review Ardell's newly-devised interpretation of Wis. Stat. § 940.32(2)(a), based on its presentation in the context of ineffective assistance of counsel. (State's Br. 13–16.) And even if this Court does review the correctness of his interpretation, it lacks merit. (State's Br. 16–24.)

conviction amended in accordance with the parties' pretrial agreement regarding the "Domestic Abuse enhancer?"

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. The parties' opening briefs address the issues and identify the controlling principles of law. Those principles compel rejection of Ardell's substantive claims.

INTRODUCTION

Six of the ten issues Ardell presents on appeal appeared in this case for the first time after trial. He has forfeited his right to direct review of those six claims, and he has not proven that trial counsel rendered ineffective assistance by failing to raise them before or during trial. For completeness, the State will address his newly-devised construction of the phrase *directed at* as used in Wis. Stat. § 940.32(2)(a). His construction runs afoul of the common-sense, plain-language meaning of the phrase, as used in the statute. As to the remaining claims: the circuit court did not err in summarily denying Ardell's postconviction motion. A new trial is not required in the interest of justice; the real controversy was fully and fairly tried. As to the final issue, this Court should order the circuit court, upon remittitur, to direct the clerk of court to enter a judgment of conviction amended in accordance with the parties' pretrial agreement regarding the "Domestic Abuse enhancer."

STATEMENT OF THE CASE

The statutory scheme.

The elements of stalking under Wis. Stat. § 940.32, as they pertain to Ardell, are as follows:

(1) Ardell intentionally engaged in a course of conduct directed at the victim, NT, meaning he acted with the purpose to engage in a course of conduct directed at her. A

"[c]ourse of conduct" is "a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose." Wis. Stat. § 940.32(1)(a). The statute lists ten examples of acts that could constitute the course of conduct. Wis. Stat. § 940.32(1)(a)1.–10.

(2) Ardell's course of conduct would have caused a reasonable person to suffer serious emotional distress, or to fear bodily injury or death to herself or to a member of her family. The term "[s]uffer serious emotional distress" means "to feel terrified, intimidated, threatened, harassed, or tormented." Wis. Stat. § 940.32(1)(d). This objective "reasonable person" standard requires the jury to determine what effect the course of conduct would have on a person of ordinary intelligence and prudence, in the intended victim's position, under the circumstances that existed at the time of the course of conduct. *State v. Hemmingway*, 2012 WI App 133, ¶ 7, 345 Wis. 2d 297, 825 N.W.2d 303.

(3) Ardell's course of conduct caused NT to suffer serious emotional distress, or induced in her fear of bodily injury or death to herself or to a member of her family. Unlike other offenses against life and bodily security, both the perpetrator's and the victim's mental states matter. Making the victim's mental state an essential element of the offense is crucial. It narrows the statute's application from what would otherwise be legitimate behavior to only behavior that actually induces fear. *Hemmingway,* 345 Wis. 2d 297, ¶ 8; *State v. Warbelton,* 2009 WI 6, ¶ 36, 315 Wis. 2d 253, 759 N.W.2d 557.

(4) Ardell knew, or should have known, that at least one of his acts would cause NT to suffer serious emotional distress, or place her in reasonable fear of bodily injury or death to herself or to a member of her family. Such knowledge may be "actual or imputed." *State v. Ruesch,* 214 Wis. 2d 548, 553, 571 N.W.2d 898 (1997). Wis. JI—Criminal 1284 (2011). *See also Hemmingway,* 345 Wis. 2d 297, ¶¶ 6–9.

To protect non-criminal expressive conduct, the statute also includes an exemption for acts protected under the First Amendment. *See* Wis. Stat. § 940.32(4).

Enacted in 1993, Wis. Stat. § 940.32 closely tracks language presented in a model statute drafted that same year by the National Institute of Justice. *Warbelton*, 315 Wis. 2d 253, ¶ 35. The model statute used the phrase *directed at*, but did not define it. National Institute of Justice, *Project to Develop a Model Anti-Stalking Code for States,* Ch. II (1993).[2]

Wisconsin Stat. § 940.32 provides a mechanism for official intervention in potentially dangerous situations before actual violence occurs. It also protects persons from recurring intimidation, fear-provoking conduct, and physical violence. *See Ruesch*, 214 Wis. 2d at 559.

The relevant factual background.

Ardell invites this Court to ignore much of NT's trial testimony, based on the existence of contradictory evidence. (Ardell's Br. 1, 3, 7, 10, 23, 30–31.) But Ardell has not proven that any of her testimony is incredible as a matter of law. *Simos v. State*, 53 Wis. 2d 493, 496, 192 N.W.2d 877 (1972). The jury determines witness credibility, resolves conflicts in testimony, weighs the evidence, and draws reasonable inferences from it. *State v. Johannes*, 229 Wis. 2d 215, 222, 598 N.W.2d 299 (Ct. App. 1999). And this Court views facts in the light most favorable to the verdict. If trial evidence supports more than one inference, this Court must accept the inference drawn by the jury. *State v. Forster*, 2003 WI App 29, ¶ 2, 260 Wis. 2d 149, 659 N.W.2d 144. This Court cannot ignore NT's testimony on Ardell's say-so.

---

[2] http://www.popcenter.org/problems/stalking/PDFs/NIJ_Stalking_1993.pdf (last visited August 31, 2017).

Ardell's stalking conviction arose out of a jury trial in November of 2015. (R. 50.) The facts that follow come from testimony and exhibits presented at trial.

NT and Ardell dated for approximately three months in 2007. (R. 89:26–27.) Ardell came to believe that NT had falsely implicated him in an arson. That belief led to his negative fixation on NT. (R. 92:46.) From the time they stopped dating, NT experienced "horror" caused by Ardell's subsequent behavior. (R. 89:35.)

In November of 2012, NT—a teacher in the Milwaukee Public School system (MPS)—learned Ardell made open records requests to MPS for her personnel records. (R. 89:17–19; 100:2.) She refused to authorize disclosure; MPS refused to turn them over to Ardell. (R. 89:19, 21.)

Ardell wrote bitter, abusive letters to MPS staff members regarding NT. The November 4, 2012, letter alleged that NT may have been involved in prostitution and unlawful drug activity. (R. 100:1.) The November 29, 2012, letter contained Ardell's open records request for NT's personnel file. (*Id*. at 2.) The December 18, 2012, letter referred to inquiries Ardell made to the Wisconsin Department of Justice regarding NT, and restated his allegation that NT had engaged in prostitution. (*Id*. at 15.) The February 15, 2013, letter promised that Ardell would pursue access to NT's personnel file for "5 years, 10 years or 15 years . . . at any monetary cost" and alleged that NT "may have lied in a restraining order involving a child that was sexually assaulted." (*Id*. at 17.)

Ardell's March 13, 2013, letter suggests he knew that NT was aware of his letters and efforts, and knew they upset her: "I further would argue that if turning over the sick days, disciplinary actions or investigation involving [NT] would cause her severe distress this should not be someone

who should be working with children and she seems rather mentally unstable . . . ." (*Id*. at 21.)

Ardell's allegations of prostitution and unlawful drug activity left NT feeling "awful. Absolutely awful." (R. 89:25.) NT had a young son she raised as a single parent. (*Id*. at 27–28.) Ardell's letters made her feel "absolutely frightened for not only my safety but now I have a little boy that depends on me. And I'm a single parent. So I felt absolutely terrified not just for myself but now I have a little boy." (*Id*.) Her fear led her to obtain a concealed carry permit. (*Id*. at 30.)

Ardell's letters and allegations caused issues with her employment and resulting distress. She had to address the allegations with her own staff. (*Id*. at 44.) In particular, she considered Ardell's allegations of child sexual assault made to her employer—MPS—"absolutely opposite of what I believe and what I am . . . . [E]ven if people don't believe it because they know my character, they're still going to look at me. Who would say this about somebody or why would they say this about somebody? I don't know what I did to deserve this." (*Id*. at 44.)

MPS successfully refused to release NT's records. (*Id*. at 20–23.) *See State ex rel. Ardell v. Milwaukee Bd. Of Sch. Directors*, 2014 WI App 66, 354 Wis. 2d 471, 849 N.W.2d 894.

Ardell called NT in May of 2013, close in time to the release of the opinion in *Ardell*. (R. 89:23, 25, 57–58.) NT did not recall Ardell's precise words, but considered them a definite threat to her personal safety. (*Id*. at 23–26.)

On May 23, 2013, she saw Ardell outside her house, which frightened her. (*Id*. at 33–34, 64.) He followed her to work, and threatened to kill her (R. 89:64–65; 90:8–9.) She requested and received a judicial restraining order against Ardell the next day—May 24, 2013. (R. 89:31–35, 58; 100:3–

14.) NT saw Ardell "numerous times" after she obtained the order. (R. 89:33, 67, 71.) He called her as well. (*Id*. at 67.)

Michelle Hagen, NT's school principal in Milwaukee at the time, testified that when NT reported for work on May 23, 2013, "she was upset stating that she had an ongoing situation of which I was aware. And that she had been followed to school by [Ardell], and he had made some threatening statements about killing her, and she was very afraid and frightened that day." (R. 90:8–9.)

Ardell's stalking conduct continued. Having learned that Hagen had left MPS for a position with the Fond du Lac public schools, Ardell sent Hagen an e-mail message on July 23, 2014. (R. 90:11; 100:174–76.) He accused Hagen of conspiring with NT against him regarding the restraining order, and threatened to protest and publicize that fact. (R. 100:174.) Speaking about himself, Ardell wrote that "[n]obody should have to deal with false allegations in life." (*Id*.)

And Ardell put the possibility of lethal violence into play. He wrote to Hagen, *verbatim*: "Perhaps you being new to the Fond du Lac area, didn't hear about the last police officer that was killed there? Well anyways long story short from what I gather this stemmed from a woman from what I heard filed a false police report that she was assaulted by the shooter who killed these officers." (*Id*. at 175; *see also* R. 90:12–15.) Hagen told NT about the message; Hagen considered it threatening. (R. 90:16, 25.)

Anna Linden, an investigator for the Milwaukee County District Attorney's Office, testified that on the morning of July 30, 2014, NT saw Ardell parked on the street in front of her home. NT made eye contact with Ardell, and drove off (R. 90:88–89.) NT also reported that in 2014, Ardell had occasionally appeared in front of NT's house and followed her to work. (*Id*. at 90.)

Linden interviewed Ardell. (*Id*. at 63–64.) Ardell initially denied contacting or calling anyone who personally knew NT. (*Id*. at 85, 86.) He later admitted trying to contact DF, the father of NT's child. (R. 89:28; 90:72–75.) NT had never told Ardell about her relationship with DF. (R. 89:28.) Ardell sent DF a message via telephone on July 30, 2014. (*Id*. at 94.)

Ardell testified. He admitted making an open records request regarding NT with the Wisconsin Department of Justice, claiming NT had made false accusations about him, and that she had engaged in prostitution and illegal drug activity. (R. 92:47–48.) He admitted sending Exhibit 2, a letter dated November 29, 2012, where he wrote to MPS and requested NT's personnel records. (*Id*. at 53; 100:2.)

He also received Exhibit 123, a letter response dated February 12, 2013, from MPS. (R. 92:54; 111:6.) The letter contained this statement: "Due to the nature of the request and pursuant to the Wisconsin Statutes, we are required to notify the individuals whose records that will be released." (R. 92:54–55; 111:6.) His attorney at the time explained to him that open records requests could result in the subject of the request receiving notification. (R. 92:62.)

Ardell's behavior continued. He searched the internet in 2014 to find people associated with NT, and discovered DF. (R. 92:92–95.) Ardell learned that DF and NT had shared a residence. (*Id*. at 94–95.) Ardell called DF multiple times and left a voicemail message for him. (*Id*. at 96–97.)

Ardell knew a restraining order was in effect against him. (*Id*. at 66, 82–83.) He e-mailed Michelle Hagen because he knew Hagen had discussed the restraining order with NT. (*Id*. at 85–91.) He searched the internet and found Hagen's contact information. (R. 93:26–27.) He also sent copies of Exhibit 9—his lengthy e-mail to Hagen, referring to a dead police officer—to other people. (*Id*. at 27–28.) He

hoped to show "how dangerous it can be" and because it "needs to be taken seriously." (*Id.* at 29–30.) He admitted sending that e-mail to many other people. (*Id.* at 31–32.) And he admitted people could construe his e-mails to Hagen as threatening. (*Id.* at 61.)

The jury found Ardell guilty of stalking. (R. 50.) The circuit court imposed a five-year sentence, with two years of initial confinement and three years of extended supervision. (*Id.*)

Ardell filed a postconviction motion challenging his conviction. (R. 54.) It contained six claims of error not raised before or during trial. They are also the first six issues Ardell raises on appeal:

First, given Ardell's interpretation of the phrase *directed at* as used in Wis. Stat. § 940.32(2)(a), did the circuit court err in admitting evidence that Ardell sought information about NT from her former supervisor? (R. 54:3–8, 11–12; Ardell's Br. *ix*, 10–26.)

Second, given Ardell's statutory interpretation, did the jury instructions—which permitted conviction based on Ardell's conversations with third parties about NT without requiring a finding that Ardell intended that the substance of the conversations be communicated to NT or encourage harassment of NT—fail to require proof beyond a reasonable doubt of all facts necessary for conviction? (R. 54:11–13; Ardell's Br. *ix*, 23–26.)

Third, given Ardell's statutory interpretation, did the jury instructions violate his First Amendment rights and Wis. Stat. §940.32(4)? (R. 54:8–9; Ardell's Br. *ix–x*, 16–18.)

Fourth, would construing or modifying Wis. Stat. § 940.32(2)(a) at this stage deprive Ardell of his constitutional due process right to notice? (R. 54:9–11; Ardell's Br. *x*, 18–21.)

Fifth, did the jury instructions as given fail to require subjective intent or purpose such that his actions would cause a reasonable person to fear bodily injury or death to herself or a member of her family? (R. 54:14; Ardell's Br. *x*, 26–27.)

Sixth, did the jury instructions as given fail to require proof beyond a reasonable doubt that Ardell knew or should have known that at least one of the acts constituting the course of conduct would—rather than merely could—place NT in reasonable fear of bodily injury or death to herself or a member of her family? (R. 54:14; Ardell's Br. *x*, 26–27.)

The circuit court denied Ardell's postconviction motion without a hearing. (R. 65.) Ardell now appeals.

STANDARDS OF REVIEW

1. Ineffective assistance of counsel claims present mixed questions of fact and law. *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334. Findings of fact receive deferential review; the legal questions of deficient performance and actual prejudice receive de novo review. *Id*.

2. Statutory interpretation presents a question of law, reviewed de novo. *State v. Hemp*, 2014 WI 129, ¶ 12, 359 Wis. 2d 320, 856 N.W.2d 811.

3. To obtain a postconviction motion hearing, a defendant must allege sufficient material facts to entitle him to relief. *See State v. Allen*, 2004 WI 106, ¶¶ 9, 36, 274 Wis. 2d 568, 682 N.W.2d 433. No hearing is required when the defendant presents only conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. *Nelson v. State,* 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972). This Court reviews the sufficiency of a postconviction motion de novo, based on the four corners of the motion. *Allen,* 274 Wis. 2d 568, ¶¶ 9, 27.

ARGUMENT

I. As to the six issues presented for the first time in postconviction proceeding, Ardell is only entitled to appellate review within the context of ineffective assistance of counsel.

Ardell has forfeited his right to direct appellate review of the six issues raised for the first time in his postconviction motion. *State v. Ndina*, 2009 WI 21, ¶¶ 29–30, 315 Wis. 2d 653, 761 N.W.2d 612; *State v. Erickson*, 227 Wis. 2d 758, 765–68, 596 N.W.2d 749 (1999). Each underlying claim could have—and should have—been raised before or during trial.

The forfeiture rule "enable[s] the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." *Ndina*, 315 Wis. 2d 653, ¶ 30. A defendant who forfeits claims may receive review only within the context of ineffective assistance of counsel. *Erickson*, 227 Wis. 2d at 766; *see also State v. Langlois*, 2017 WI App 44, ¶ 17.

Ardell has forfeited his right to direct appellate review of the first six issues he presents for review. By failing to raise the six issues before or during trial, he deprived the circuit court of the opportunity to weigh them in the context of the case. Timely objection and argument could have allowed the parties and the circuit court to address those issues before or during trial. The losing party could also have asked this Court to invoke its discretionary appellate jurisdiction and obtain pretrial guidance. *See* Wis. Stat. § (Rule) 809.50. Scarce litigation and judicial resources could have been conserved. Consequently, this Court should apply the forfeiture rule and review the first six issues in the context of ineffective assistance of trial counsel.

Ardell anticipated the State's forfeiture argument by asserting, *pro forma*, that his trial counsel was ineffective for

failing to properly preserve the six issues. (Ardell's Br. 27–29.) The State addresses that argument next.

II. Because ineffective assistance of counsel cases involve situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue, trial counsel did not render deficient performance by failing to make objections and present argument on the first six issues Ardell presents on appeal.

A. Controlling principles of law.

To establish ineffective assistance of trial counsel, Ardell must show both deficient performance and actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, Ardell must identify the specific acts or omissions by trial counsel that fall "outside the wide range of professionally competent assistance." *Id.* at 690. To prove actual prejudice, Ardell must demonstrate that counsel's deficient performance deprived him of a fair trial and a reliable outcome. *Id.* at 687. Ardell "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

With particular application here, this Court limits ineffective assistance of counsel cases "to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994), *quoted with approval in State v. Lemberger*, 2017 WI 39, ¶ 33, 374 Wis. 2d 617, 893 N.W.2d 232. *See also State v. Maloney*, 2005 WI 74, ¶¶ 24–28, 281 Wis. 2d 595, 698 N.W.2d 583; *State v. Morales-Pedrosa*, 2016 WI App 38, ¶ 16, 369 Wis. 2d 75, 879 N.W.2d 772 (no Sixth Amendment duty to object and argue an "unclear" point of law). A failure to raise a novel

argument, or one requiring resolution of an unsettled legal question, will not normally constitute deficient performance. *Lemberger*, 374 Wis. 2d 617, ¶¶ 18, 33. The Sixth Amendment guarantees criminal defendants a fair trial and a competent attorney. It does not insure that trial counsel will recognize and raise every conceivable claim. *See Engle v. Isaac*, 456 U.S. 107, 134 (1982). Likewise, the failure to raise a meritless argument does not constitute ineffective representation. *See State v. Reynolds*, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996).

B. The first six issues Ardell presents on appeal are novel, and turn on unsettled legal questions. Trial counsel did not render deficient performance by failing to base objections and argument on them before or during trial.

The first six issues Ardell presents on appeal are the product of postconviction contemplation. They represent "the retroactive conclusion[s] of postconviction counsel," informed by hindsight. *Kain v. State*, 48 Wis. 2d 212, 222, 179 N.W.2d 777 (1970). And they are novel, requiring resolution of unsettled legal questions. Thus, this Court should not find trial counsel ineffective for failing to raise them before or during trial.

The first four issues stem from Ardell's postconviction construction of the phrase *directed at* in Wis. Stat. § 940.32(2)(a). Ardell concedes that no Wisconsin court has addressed the question whether a conviction under that statute requires direct acts or communication between the defendant and the victim, as opposed to acts or communications through third parties. (Ardell's Br. *xii*.) He cites several cases from other jurisdictions that he says support his position. (*Id*. at 13–16.) The State will distinguish some of those cases, and cites others that reject Ardell's analysis *infra*. The State sees no clear consensus

among reviewing courts, and nothing at all to suggest that the law was so clear that Ardell's counsel should have known to raise the issues. *See McMahon*, 186 Wis. 2d at 85.

And with respect to his fifth and sixth issues on appeal, Ardell cites no decisions—from Wisconsin or elsewhere—that address the mental state required of the defendant to convict him of stalking under Wis. Stat. § 940.32(2). That makes his position—that the State had the burden to prove his subjective intent to cause NT distress or fear—novel, and unsupported by Wisconsin law.

His position also lacks apparent merit. Ardell asserts that Wis. Stat. § 940.32(2) required the State to prove Ardell *subjectively* intended to cause NT the necessary distress or fear. (Ardell's Br. 26–27.) He is wrong. The State was not required to prove Ardell's subjective intent. Nor was the State required to prove that Ardell knew his conduct would cause NT to suffer distress or fear. Rather, the stalking statute requires that the "actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household." Wis. Stat. § 940.32(2)(b). A "knew or should have known" test is an *objective* standard. *Howell v. Denomie*, 2005 WI 81, ¶ 8, 282 Wis. 2d 130, 698 N.W.2d 621. Trial counsel had no duty to raise a meritless claim. *Reynolds*, 206 Wis. 2d at 369.

Ardell asserts ineffective assistance *pro forma* at pages 27–29 of his opening brief. But Ardell fails to explain why trial counsel's failure to make the necessary objections and arguments fell outside the wide range of professionally reasonable assistance guaranteed by the Sixth Amendment and *Strickland*.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Ardell has not shown that, with respect to Wis. Stat. § 940.32(2), the law or duty were so clear at the time of trial that prevailing professional norms required his trial counsel to present the five forfeited claims before or during trial. As was the case in *Lemberger*, trial counsel—at the absolute best—faced unsettled legal questions at trial. 374 Wis. 2d 617, ¶ 33. The Sixth Amendment did not require him to raise the six claims. *Id.*

Because of Ardell's forfeiture—and because his trial counsel did not render ineffective assistance in failing to raise these issues— this Court may end its consideration of the six claims here.

But since Ardell has asked this Court to exercise its discretionary reversal power, *see* Wis. Stat. § 752.35, the State will address Ardell's core contention—that the phrase *directed at* in Wis. Stat. § 940.32(2)(a) excludes acts or communications regarding the alleged victim but directed at third parties, absent the jury finding beyond a reasonable doubt that the defendant either intended the information to be passed on to the alleged victim, or intended the third parties to harass the alleged victim based on the information. That interpretation fails to persuade.

III. Wisconsin Stat. § 940.32(2) properly permits both direct communications between the defendant and the victim, as well as communications through third parties, as part of the "course of conduct" criminalized by the statute.

A. Controlling principles of law.

Courts interpret statutes to determine their meaning and give them their full, intended effect. *State v. Doss*, 2008 WI 93, ¶ 30, 312 Wis. 2d 570, 754 N.W.2d 150. The process begins with the statutory language. If it is plain and

unambiguous, the court will apply the "ordinary and accepted meaning of the language to the facts" presented, and the task is complete. *State v. Kittilstad*, 231 Wis. 2d 245, 256, 603 N.W.2d 732 (1999). *See also* Wis. Stat. § 990.01(1) (providing that all words and phrases should be construed according to their common and approved usage).

A court may properly use a dictionary to determine the ordinary, accepted meaning of a term in a statute. That does not render the term ambiguous. *State v. Whistleman*, 2001 WI App 189, ¶ 6, 247 Wis. 2d 337, 633 N.W.2d 249.

Absent specific limiting language, statutory provisions should apply to all situations fairly included within their terms. *State v. Badzmierowski,* 171 Wis. 2d 260, 263–64, 490 N.W.2d 784 (Ct. App. 1992). "If the language of a statute reasonably covers a situation, the statute applies irrespective of whether the legislature ever contemplated that specific application." 2B Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction,* § 54:5 (7th ed. 2016).

Ardell favors strict construction. (Ardell's Br. 11–12.) But strict construction is not appropriate "when the legislature's intent is unambiguous, or when strict construction goes against the legislature's purpose." *Kittilstad*, 231 Wis. 2d at 262. Strict construction is not appropriate if the commonsense view of the statute as a whole, giving effect to the intent of the legislature, reasonably leads to a broad application. *Id*. at 267.

B. Under Wis. Stat. § 940.32(2)(a), the phrase *directed at* includes not only direct acts and communication between the defendant and victim, but also acts and communication through third parties.

The first element of stalking under Wis. Stat. § 940.32(2)(a) requires the defendant to engage in a course of

conduct *directed at* the victim. The phrase has no esoteric meaning. It is not a legal term of art. It lends itself to interpretation by use of a dictionary.

According to a common online dictionary—and as applied here—a defendant engages in a course of conduct *directed at* the victim where the defendant causes his "attention, thoughts, emotions, etc. to relate to a particular person, thing, goal, etc."[3] The defendant's conduct must specifically relate to his victim.

This common-sense, plain-language definition does not require direct communication between defendant and victim, as opposed to communication through a third party. And no other part of Wis. Stat. § 940.32(2) limits its applicability in this manner. The statute draws no distinction between direct communication and communication through a third party. This Court should not read such a limitation into the statute. As in *Badzmierowski*, "[t]he statute does not mention any such distinction, and we refuse to read one into it." 171 Wis. 2d at 263. That this definition may broaden the applicability of the statute beyond the contemplation of the Legislature—or Ardell—does not require this Court to reject it. Singer & Singer, *supra*, § 54:5. This definition is consistent with the laudable goals of the statute: to protect people from recurring intimidation and to allow for law enforcement intervention before violence occurs. *Ruesch*, 214 Wis. 2d at 599; *Kittilstad*, 231 Wis. 2d at 267.

Here, the jury could easily and reasonably conclude that Ardell's communications to third parties—Michelle Hagen, DF, other MPS employees—specifically related to NT. The multiple communications referred to her explicitly, and fell within the scope of acts establishing the "course of

---

[3] http://www.learnersdictionary.com/definition/direct (last visited August 31, 2017).

conduct" necessary to establish stalking. *See*, *e.g.,* Wis. Stat. § 940.32(1)(a)3. (contacts with victim's employers or co-workers); sub. (1)(a)7. (sending material seeking or disseminating information about victim to friends).

Ardell construes the phrase *directed at* to mean that he could only be found guilty under Wis. Stat. § 940.32(2)(a) if the State had proven beyond a reasonable doubt that he either intended the third parties—Michelle Hagen, DF, other MPS employees—share the substance of the communications with NT, or that the third parties harassed NT as a result of the communications. (Ardell's Br. at 7–8, 10–16.) But by its terms, the statute does not require proof of these mental elements. The statute prohibits intentionally engaging in a course of conduct, directed at the victim, when the defendant knew or should have known at least one of his acts would cause NT to suffer serious emotional distress, or place her in fear of bodily injury or death to herself or a family member. Such knowledge may be actual or imputed. *Ruesch*, 214 Wis. 2d at 548, 553.

From the evidence of Ardell's sustained barrage of letters, telephone calls, home visits, and following, the jury here could easily conclude that Ardell knew his acts would have the necessary effect on NT. Ardell's March 13, 2013, letter, included a sentence from which the jury could find that Ardell knew that NT knew about his earlier letters and requests, and knew they would have a negative effect on her: "I further would argue that if turning over the sick days, disciplinary actions or investigation involving [NT] would cause her severe distress this should not be someone who should be working with children and she seems rather mentally unstable . . . ." (R. 100:21.)

Ardell also presents cases from other jurisdictions to buttress his interpretation of the phrase *directed at*. (Ardell's Br. 12–16.)[4] They do not bring the correctness of the State's common-sense, plain-language interpretation into question.

Some of the cases Ardell cites involve very dissimilar fact situations, making them unpersuasive here. This is not a case involving computer websites, blogs, or other situations involving communications directed to the public. *See Chan v. Ellis*, 770 S.E.2d 851, 854 (Ga. 2015); *David v. Textor*, 189 So. 3d 871, 875 (Fla App. 2016). This is not a case involving only complaints to government agencies—complaints which enjoyed constitutional protection and served a legitimate purpose within the meaning of the state's statute. *Curry v. State*, 811 So. 2d 736, 738, 741 (Fla. App. 2002). This is not a case involving protected political speech. *LaFaro v. Cahill*, 56 P.3d 56, 58 (Az. App. 2002).

In contrast, the State notes an unpublished opinion—one from Arizona that postdates *LaFaro*—which may lead this Court to reject Ardell's argument. *See State v. Sebba*, Nos. 1 CA-CR 10-0687 and 1 CA-CR 10-0693, 2012 WL 209751 (Ariz. Jan. 24, 2012). (R-App. 101–08.) *Sebba* appears in the State's Supplemental Index.

Arizona indicted Sebba for stalking and aggravated harassment arising out of a dispute between neighbors. *Id*. ¶¶ 2–3. (R-App. 101.) The victim sought and received an injunction prohibiting harassment. *Id*. ¶ 3. (R-App. 101.) Sebba ignored it. He sent a letter to the school principal of

---

[4] He also cites one Wisconsin case involving use of the phrase *directed at*. (Ardell's Br. 12.) See *Leonard v. State,* 2015 WI App 57, 364 Wis. 2d 491, 868 N.W.2d 186. But that case involves application and interpretation of 18 U.S.C. § 922(g)(9), a federal firearms disability statute. *Leonard,* 364 Wis. 2d 491, ¶ 31. It is unhelpful here.

the victim's children. He also contacted the security guard, the site manager, and the property manager at the building where his victim worked. *Id.* ¶¶ 5, 7. (R-App. 101–02.) Sebba's letter to the principal included information regarding his disputes with the victim's family. The contacts with the victim's building staff included negative comments regarding the victim. *Id*. The victim learned about Sebba's contacts with her building staff because she had asked the staff to report any contacts they had with Sebba to her, and the property manager testified she would have contacted the victim as a matter of routine. *Id*. ¶ 7. (R-App. 102.) The victim considered the contacts threatening. *Id*.

The *Sebba* court rejected Sebba's argument—similar to Ardell's—that he was entitled to jury instructions stating that (1) Arizona law required the defendant's course of conduct or communication "be directed at a specific person. It is not enough if the person learns from a third party about the conduct or communication later . . . if the conduct or communication is initially directed at a third party," and (2) any communications with a third party could only support guilt if Sebba "intentionally or knowingly directed that third party to communicate with the complainants on [Sebba's] behalf." *Id*. ¶ 11. (R-App. 103.) Like Wis. Stat. § 940.32(2), the Arizona statute did not require acquittal if the "communication is initially directed at a third party," or if the defendant "did not knowingly or intentionally direct the third party to communicate with the complainants on his behalf." *Id*. ¶ 13. (R-App. 103.)

The court also found that the Arizona statute—again, like Wis. Stat. § 940.32(2)—"does not require that the alleged harasser must have explicitly directed a third party to convey his communication to the victim to prove that the communication was 'directed at' the victim. The statute simply prohibits 'caus[ing] a communication' with the victim, 'directed at' the victim, knowing he is harassing, intending

to harass, or in a manner that harasses." *Sebba,* 2012 WL 209751, ¶ 17. (R-App. 104.) The court concluded that "[t]he jury had to determine whether Sebba intended to harass the victim, or knew that he was harassing the victim, by causing harassing communications with, and directed at, the victim, based on the direct and circumstantial evidence, and any reasonable inferences therefrom. The instructions Sebba requested would have misled the jury about the statutory requirements for criminal harassment and the evidence required to prove it. Consequently, the trial court did not abuse its discretion by refusing the give the requested instruction." *Id.*

The *Sebba* court's analysis undercuts Ardell's position that acts and communications between the defendant and the third party normally fall outside the ambit of Wis. Stat. § 940.32(2). It also undercuts his position that he should have received a jury instruction requiring the State to prove that he either intended the third parties in his case to share the substance of the communication with NT, or that the third parties act on the communication and harass NT themselves.

The *Sebba* court went on to conclude that the evidence presented at Sebba's trial supported his conviction for aggravated harassment. *Sebba,* 2012 WL 209751, ¶¶ 24–25. (R-App. 106.) The court rejected Sebba's contention that his contacts with third parties—the victim's building staff—failed to constitute harassment *directed at* the victim. *Id.* The court concluded that "the number and nature of the contacts, and their effect on the victim, would allow a reasonable jury to infer that Sebba intended to harass the victim by making the calls to the building employees and indicating that he wanted to lease space in the building and intended to sue the victim for the earlier incident because he believed he had a right to enter the public building at any time." *Id.* ¶ 25. (R-App. 106.)

Here, as in *Sebba*, the number and nature of Ardell's contacts and their effect on NT—even when passed on through third parties—provided an adequate factual basis to support Ardell's conviction.

Like the defendant in *Sebba*, Ardell fixated on his victim, NT, and engaged in a series of acts and communications *directed at* her. While the acts and communications involved third parties, they specifically related to her. They were focused directly at her. The effect on NT was no less detrimental simply because Ardell involved third parties. And NT was no less worthy of law enforcement protection and judicial intervention simply because Ardell involved third parties. *Ruesch*, 214 Wis. 2d at 559. "A statute should be construed to give effect to its leading idea and should be brought into harmony with its purposes." *State v. Johnson*, 2005 WI App 202, ¶ 20, 287 Wis. 2d 313, 704 N.W.2d 318 (citation omitted). Construing the phrase *directed at* in the manner suggested by the State accomplishes that purpose.

IV. Ardell has not demonstrated that the circuit court's summary denial of his postconviction motion independently warrants appellate relief.

At page *xi* of his brief, Ardell asserts the following issue on appeal: "Whether the circuit court erred in denying Ardell's motion without a hearing." At page 7, footnote 3 of his brief, Ardell (1) faults the circuit court for "summarily adopting the [S]tate's post-conviction response" in denying the motion, and (2) contends that "remand only would be necessary if the Court chooses not to reverse Ardell's conviction outright but instead holds that a hearing is necessary on his ineffectiveness claim." *See, e.g., State v. McDermott*, 2012 WI App 14, ¶ 9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237 (improper for circuit court to simply accept a party's position in postconviction proceedings without stating specific reasons for doing so). That is the last

discussion of the circuit court's summary denial of Ardell's motion.

To the extent Ardell contends the circuit court's summary denial of his postconviction motion independently warrants appellate relief, he has presented no argument in support of that contention. This Court may deem it inadequately briefed and reject it. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

To the extent he contends the circuit court's reliance on the prosecutor's brief in opposition to his postconviction motion independently warrants appellate relief under *McDermott* or any other case, his failure to present argument in support of that contention renders it inadequately briefed as well. *Id.*

Finally, no remand for a *Machner* hearing is necessary. As a matter of law, trial counsel was not ineffective for failing to raise the first six issues raised on appeal because the issues themselves were novel, and dependent on unsettled legal issues. (State's Br. 13–16.) If the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may, in the exercise of its discretion, deny the motion without a hearing. *See Nelson*, 54 Wis. 2d at 497–98. This Court will affirm a discretionary order if it has a reasonable basis. *Littmann v. Littmann*, 57 Wis. 2d 238, 250, 203 N.W.2d 901 (1973). Limiting claims of ineffective assistance to situations where the law and duty are clear enough that reasonable counsel should know enough to raise the issue is manifestly reasonable. *McMahon*, 186 Wis. 2d at 85; *Lemberger*, 374 Wis. 2d 617, ¶ 33.

V. Ardell is not entitled to a new trial in the interest of justice.

Wisconsin Stat. § 752.35 provides this Court with discretionary authority to order a new trial in the interest of

justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17–19, 456 N.W.2d 797 (1990). But this Court should exercise this discretionary authority "infrequently and judiciously," and only in "exceptional cases." *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60. Under the "real controversy not fully tried" standard, discretionary reversal arises either when (1) the jury erroneously was not given the opportunity to hear important testimony bearing on an important issue of the case, or (2) the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

When, as here, a defendant's argument for a new trial under Wis. Stat. § 752.35 involves an assertion that the basis for a new trial derives from ineffective assistance of counsel, the appropriate analytical framework is provided by *Strickland*. *See State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115.

Ardell's request for a new trial in the interest of justice turns on his contention that, as used in Wis. Stat. § 940.32(2)(a), the phrase *directed at* excluded acts or communications regarding the alleged victim but directed at third parties, absent a jury finding beyond a reasonable doubt that the defendant either intended the information to be passed on to the alleged victim, or intended the third parties to harass the alleged victim based on the information: "The prosecutor specifically based his case against Ardell on the erroneous theory that the 'course of conduct' required for a stalking conviction may be constructed out of the defendant's communications with third parties even absent any evidence or jury finding beyond a reasonable doubt that Ardell intended the substance of those communications to be relayed back to N.T. or used by third parties to harass her." (Ardell's Br. 33.)

In the foregoing portions of this brief, the State has shown that (1) trial counsel did not render ineffective assistance by failing to raise this novel claim, dependent upon unsettled legal questions, and (2) Ardell's newly-devised interpretation of Wis. Stat. § 940.32(2)(a) runs afoul of the common-sense, plain-language interpretation of the statute, which properly allows conviction based on acts or communications through a third party. (State's Br. 12–24.) This is not one of the exceptional cases warranting reversal in the interest of justice. *Avery*, 345 Wis. 2d 407, ¶ 38; *Mayo*, 301 Wis. 2d 642, ¶ 60.

VI. This Court should order the circuit court, upon remittitur, to direct the clerk of court to enter a judgment of conviction amended in accordance with the parties' pretrial agreement regarding the "Domestic Abuse enhancer."

The State originally charged Ardell with three crimes: (1) Stalking, with a previous conviction within seven years; (2) Knowingly violating a domestic abuse temporary restraining order; and (3) Harboring or aiding a felon by destruction of evidence. (R. 25.) Ardell's conviction on the stalking charge is at issue here.

Ardell's stalking charge included: (1) an allegation that, because the charge involved an act of domestic abuse under Wis. Stat. § 968.075(1)(a), costs upon conviction would include the domestic abuse assessment imposed under Wis. Stat. § 973.055(1), and (2) an allegation that Ardell's status as a repeat domestic abuse offender subjected him to penalty enhancement under Wis. Stat. §§ 939.621(1)(b) and (2). (R. 25.)

Pretrial, the parties agreed "to dismiss the domestic abuse enhancer" in the stalking count and in the violating-a-domestic-abuse-TRO count; the circuit court so ordered. (R. 88:14.) But the judgment of conviction contains both the

domestic abuse cost assessment and the domestic abuse penalty enhancement provisions. (R. 50.)

On appeal, the State assumes—but cannot know for sure from the record—that the parties intended to remove both the cost enhancement and penalty enhancement provisions from the stalking charge. Ardell may be able to clarify the point in his reply brief. Failing that, this Court should order the circuit court, upon remittitur, to direct the clerk of court to enter a judgment of conviction amended in accordance with the parties' pretrial agreement regarding the "Domestic Abuse enhancer." *See State v. Prihoda*, 2000 WI 123, ¶ 17, 239 Wis. 2d 244, 618 N.W.2d 857 (appellate court's authority to correct clerical errors). If an actual dispute exists regarding the scope of the amendment, the parties may resolve it in the circuit court.

CONCLUSION

This Court should affirm Ardell's judgment of conviction and the order denying his motion for postconviction relief.

Dated at Madison, Wisconsin, this 5th day of September, 2017.

BRAD D. SCHIMEL
Wisconsin Attorney General

GREGORY M. WEBER
Assistant Attorney General
State Bar #1018533

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 266-9594 (Fax)
webergm@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7375 words.

_____
GREGORY M. WEBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of September, 2017.

_____
GREGORY M. WEBER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Korry L. Ardell
Case No. 2017AP381-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____

GREGORY M. WEBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 5th day of September, 2017.

_____

GREGORY M. WEBER
Assistant Attorney General